

D.P.U. 93-41

Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in the following tariff: M.D.P.U. No. 277, filed with the Department on February 12, 1993 to become effective September 1, 1993 by Commonwealth Electric Company.

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## I. INTRODUCTION

### A. Procedural History

On February 12, 1993, pursuant to G.L. c. 164, § 94, Commonwealth Electric Company ("Commonwealth" or "Company") filed with the Department of Public Utilities ("Department") a tariff for a Vacant Space rate, M.D.P.U. 277, to become effective March 1, 1993. The proposed tariff would provide a new rate schedule ("Rate G-8"), offering discounted prices to medium and large commercial and industrial customers who request electric service in currently unoccupied building spaces within the Company's service territory. On February 26, 1993, the Department, after reviewing the filing in the case, determined that further investigation was necessary and suspended the operation of the rates and charges until June 1, 1993. The investigation was docketed as D.P.U. 93-41.

The Department indicated that its intent in this proceeding was to establish a standard of review for proposed economic development rates ("EDRs"), as well as to rule on Commonwealth's proposed Vacant Space rate. On April 28, 1993, as part of its investigation, the Department requested that all interested persons file comments by May 21, 1993, on the proposed Vacant Space rate and/or the appropriate standard of review for EDRs. The Department set out the following list of issues for comment:

- (1) Filing requirements for EDRs;
- (2) The appropriate factors to be considered in reviewing EDRs, e.g.,
  - Eligibility criteria for new, retention and expansion customers,
  - Impact on current vs. future ratepayers,
  - Duration of rate offering, e.g., tying it to over-capacity situation,
  - Propriety of Conservation and Load Management ("C&LM") requirement for EDR customers;
- (3) Determination of rate, e.g., is marginal cost plus some additional margin appropriate;
- (4) Ratemaking treatment; and
- (5) Tailoring scope of review to different types of EDRs.

Comments were filed by the Attorney General of the Commonwealth ("Attorney General"), Boston Edison Company ("BEC"), Commonwealth and Cambridge Electric Light Company ("CEL"), the Conservation Law Foundation ("CLF"), the Commonwealth's Executive Office of Economic Affairs, Division of Energy Resources ("DOER"), Eastern Edison Company ("EE"), Fitchburg Gas and Electric Light Company ("Fitchburg"), and Senator Mark Montigny (Second Bristol District). The Department, after consideration of these comments, determined that further investigation was necessary and, on May 26, 1993, resuspended the operation of the rates and charges until September 1, 1993.

Pursuant to notice duly issued, the Department held a public hearing in this case on July 19, 1993. At the hearing, the Department granted motions for leave to intervene from Massachusetts Electric

Company ("MECo"), EEC Co, the Attorney General, and DOER. The Department also granted limited intervenor status to BECo. No other petitions for leave to intervene were filed. In the public hearing, the Department took evidence, and issued eight record requests. The Company also submitted four exhibits. All exhibits were entered into evidence. At the conclusion of the public hearing, parties were afforded the opportunity to file supplemental comments and reply comments. Supplemental comments were filed by the Attorney General, Commonwealth, DOER, MECo and EEC Co. Reply comments were filed by Commonwealth.

B. Description of Proposed Vacant Space Rate

Commonwealth's proposed Vacant Space rate, Rate G-8, is a new, generally-available rate schedule designed to offer discounted prices to medium and large commercial and industrial customers who request electric service in building space that has been unoccupied for a period of at least twelve consecutive months prior to the occupation by the customer requesting service on Rate G-8 and who would otherwise qualify for service under the Company's available Medium General Time-of-Use Rate ("Rate G-2") or the Large General Time-of-Use Rate ("Rate G-3") (Exh. C-1).<sup>1</sup> Under proposed Rate G-8, Commonwealth

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<sup>1</sup> Rate G-2 is available for all uses of electricity to customers who  
(continued...)

would offer a twenty-five percent discount on the customer, demand, and energy charges listed in the currently effective Rate G-2 or Rate G-3 for a two-year term (id.).

In offering Rate G-8, Commonwealth proposed the following special provisions: (1) Commonwealth could deny availability to any customer who terminated service at another location in its service territory within the twelve months prior to application for service under Rate G-8; (2) Commonwealth could refuse to make the rate available if doing so would require Commonwealth to make a substantial investment in new facilities; (3) all customers taking service under Rate G-8 would be required to make all reasonable efforts to participate in Commonwealth's available Conservation and Load Management ("C&LM") programs; and (4) Commonwealth, at its discretion, could close Rate G-8 to new customers but not earlier than twelve months following the effective date of the tariff (Exh. C-2, at 2).

## II. GENERIC ISSUES

The Department will first address the issues generically applicable

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<sup>1</sup>(...continued)

establish demands in excess of 100 kilowatts ("KW"), but not greater than 500 KW, for at least 12 consecutive months (M.D.P.U. No. 262). Rate G-3 is available for all uses of electricity to customers who establish demands in excess of 500 KW for at least 12 consecutive months (M.D.P.U. No. 263).

to EDRs and then analyze the Vacant Space rate in light of our findings on these generic issues.

Specifically, the Department will analyze the following generic issues:

- A. Goals, benefits and risks of EDRs
- B. Availability -- Eligibility Requirements
  - To whom should EDRs be available (retention, new, expansion customers?)
  - What showing must be made to qualify for EDRs?
  - Other Requirements
- C. Administration -- Tariff or Contract
- D. Conservation and Load Management
- E. Determination of EDRs
- F. Duration of EDRs
- G. Ratemaking Treatment
- H. Impact of New Standards on Existing EDRs and EDR customers

A. Goals, Benefits and Risks of EDRs

1. Introduction

The parties have advanced various goals for EDRs as well as risks associated with EDRs. The two principal goals discussed by the parties in terms of potential benefits of EDRs are (a) economic use of excess capacity and (b) economic revitalization in Massachusetts. The risks most often cited are (a) encouraging uneconomic or inefficient use of electricity, (b) potential subsidization of EDRs by other ratepayers, (c) potential free-riders, <sup>2</sup> and (4) promoting relocation of customers from

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<sup>2</sup> For purposes of this Order, the term "free-riders" refers to  
(continued...)

one Massachusetts utility's service territory to another.

2. Positions of Parties

a. The Attorney General

The Attorney General asserts that EDRs can legitimately be considered short-term measures to advance the goals of "improving employment conditions and facilitating incremental, economic sales of electric service" in the context of a weak state economy and an excess capacity situation for electric utilities (Attorney General Comments at 2). The Attorney General argues that the approval of such rates, including the proposed Vacant Space rate, is consistent with the Department's jurisdiction, as long as (1) the policy goals are rational, (2) the terms of the rate are consistent with the goals, and (3) the classification of the customers is reasonable (id. at 2-3). The Attorney General asserts, however, that the Department should only approve EDRs when the tariff will not encourage uneconomic sales (id. at 6). The Attorney General maintains that the potential for uneconomic sales can be minimized by properly determining the availability, rate to be charged, and duration of EDRs (id. at 6-8).

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<sup>2</sup>(...continued)

customers that would have remained, located, or expanded in a utility's service territory without the EDR.



b. BECo

BECo considers EDRs to be a key tool in promoting economic growth and retaining the current level of manufacturing business in Massachusetts, which can benefit the EDR customers, the utility and all ratepayers (BECo Comments at 1-3). BECo states that the only potential risk associated with EDRs is if an EDR is not properly calculated and does not include all appropriate future costs, in which case future customers would subsidize the EDR. BECo asserts that as long as EDRs are calculated, designed and administered properly, this risk will be avoided and EDRs will result in benefits to other customers (id. at 2).

c. CLF

CLF asserts that the goal of EDRs -- to stimulate commercial and industrial growth -- actually can be undercut if the rate is not carefully designed. CLF asserts that the drawbacks associated with EDRs include (1) promoting overuse of electricity without capturing the medium-to long-term cost of production, (2) encouraging the production of electricity which causes harm to the environment and human health, and (3) the potential for free-riders and cross-subsidization (CLF Comments at 1-2). CLF suggests that the drawbacks of EDRs be addressed by the Department in its review of individual EDR filings (id. at 2-3). Moreover, in contrast with what CLF sees as the Department's

mandate to consider the environmental effects of its actions, CLF questions the Department's jurisdiction to promote general economic development within the Commonwealth, especially where that goal may conflict with or compromise environmental protection (id.).

d. Commonwealth and CELCo

Commonwealth and CELCo note that the need for and benefits of EDRs have been assumed as a matter of policy over the past two years, and asserts that EDRs can have significant impacts on the economic health of the state and the well-being of all customers (Commonwealth and CELCo Comments at 1). While acknowledging that economic revitalization may be a sound objective and implicit in economic development concepts, Commonwealth emphasizes that the goal underlying the use of EDRs is to create more sales and thereby benefit all customers (Commonwealth Reply Comments at 2).

e. DOER

DOER asserts that the judicious use of EDRs during recessionary times can promote economic development in the state by retaining and creating jobs, providing investment money and tax contributions, expanding business services, and making Massachusetts more competitive with other states (DOER Comments at 1). DOER contends that the goals of EDRs should be to assist troubled businesses and

promote new or expanded businesses, rather than to solely absorb excess capacity or to protect a utility against competition from another Massachusetts utility. According to DOER, EDRs targeted at vacant space can also provide environmental benefits by utilizing existing facilities, and encouraging economic development in depressed areas (id. at 1-2). DOER asserts that EDRs such as the Vacant Space rate can encourage economic revitalization in areas that have surplus business space or manufacturing space and at the same time, improve the overall utilization of utility capacity, thereby providing benefits to all ratepayers (DOER Supplemental Comments).

f. EECo

While not directly addressing the goals of EDRs, EECo asserts that: (1) an EDR can and should be designed to provide the benefit of a contribution to fixed costs in the situation of excess capacity, thereby offsetting the costs to serve all customers; and (2) the criteria for eligibility should be broad enough to allow companies to work with state development agencies to create a package of incentives to attract new business (EECo Comments at 2-3; EECo Supplemental Comments at 2).

g. MECo

MECo asserts that EDRs should be designed to result in economic growth in the state and that, in a period of excess capacity, it is better

to have some contribution rather than no contribution to fixed costs (MECo Supplemental Comments at 2-3). MECo identifies two specific risks associated with EDRs: (1) free-riders; and (2) the potential for EDRs to promote relocation within the Commonwealth. With regard to free-riders, MECo asserts that while the potential is inevitable, the "... careful design of EDRs can minimize free ridership to the point where it is likely to be outweighed by the benefits of the EDR" (id. at 3-4). With regard to promoting relocation within Massachusetts, MECo asserts that there is no net advantage to the state from intra-state utility competition for customers. MECo recommends eliminating this risk through availability requirements in the EDRs (id. at 5).

h. Senator Montigny

Senator Montigny considers EDRs part of an effort to mitigate the impacts of high electricity rates, which in turn will affect the ability of the state to conduct business in a profitable and competitive manner (Senator Montigny Comments).

3. Analysis and Findings

Under G.L. c. 164, § 94, the Department has the authority to allow different rates for different classes of customers, under a reasonable classification, as long as the rates are not unduly or irrationally discriminatory. See American Hoechst Corp. v. Department of Public Utilities, 379 Mass. 408, 411-412 (1980). Factors such as size, location

or type of business, together with the impact on company revenues, the benefits of the proposed rate and the advancement of public policy have been recognized by the supreme judicial court as legitimate considerations for the Department in approving the design of rates.

See Boston Real Estate Board v. Department of Public Utilities, 334 Mass. 477, 495 (1956); Brand v. Water Commissioners of Billerica, 242 Mass. 223, 227 (1922); New England Telephone & Telegraph Company v. Department of Public Utilities, 371 Mass. 67, 85 (1976).

The Department has approved ten EDRs since 1991, which include a variety of eligibility requirements and terms. All of these EDRs, and the instant Vacant Space proposal, have been filed in the midst of a recessionary economy and a situation of excess capacity for the utilities. As a general premise, the Department is concerned with the efficient use of electricity, especially when there is excess capacity, because ratepayers and utilities would have to absorb the costs of that excess. With proper safeguards, the Department believes that the sale of excess capacity under an EDR available for load that would not be served under a company's general rate schedule can benefit (1) the EDR customers, as part of an economic incentive package, (2) other ratepayers and (3) the utility, through additional contributions to fixed costs and the spreading of costs over a larger customer base. While EDRs imply economic development as a primary goal, any social

benefits should be considered a secondary goal, to be assessed within the current situation of utility excess capacity. Therefore, our primary goal in approving any EDR is to increase the overall contribution to a utility's fixed costs, which in turn may serve to delay the need for a base rate increase, and thereby benefit all ratepayers.<sup>3</sup>

To assist the Department in determining whether a proposed EDR meets the above goals, the Department places utilities on notice that they will be required to demonstrate in their next general rate cases: (1) that they have evaluated EDRs relative to other opportunities in an excess capacity situation, such as off-system sales, contract buy-outs, and unit retirements; and (2) that an EDR is a reasonable component of a company's strategy to efficiently use excess capacity and fulfill its least cost planning obligation.

In the sections that follow, we consider both the potential benefits of EDR rates, especially benefits to ratepayers, and the potential risks of EDRs, including the potentials for free riders, cross-subsidization, uneconomic or inefficient use of electricity, inconsistency with other Department policies, such as C&LM, and the migration of customers

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<sup>3</sup> The Department notes that achieving the goal of increasing the overall contribution to fixed costs is dependent upon EDRs contributing more than the marginal cost of serving EDR customers. In Section II.E, below, the Department addresses the issue of the appropriate determination of an EDR.

between service territories. Based on our analysis and findings infra, we conclude that there are no risks that have been presented in this proceeding that cannot be reasonably addressed through the careful design of EDRs, and we set out guidelines for EDR design, along these lines.

B. Availability -- Eligibility Requirements

1. Introduction

Many EDRs currently in effect recognize a distinction among: (1) new customers who cause incremental load on the utility's system ("new customers"); (2) existing customers who cause new load growth ("expansion customers"); and (3) existing customers who maintain their historical level of load ("retention customers"). In this section, we discuss appropriate eligibility requirements for these groups of customers.

2. Positions of Parties

a. The Attorney General

The Attorney General submits that EDRs should be available only to customers who would not otherwise locate, expand, or continue operations in a particular service territory (Attorney General Comments at 6). The Attorney General recommends requiring that utilities provide the Department with written notice of their determination that a customer is eligible for an EDR, as well the basis for and evidence

supporting the determination, to ensure that any eligibility requirements are followed (id.).

b. BECo

BECo asserts that only customers engaged in manufacturing who have a clear economic alternative to the utility's filed rates should be eligible for EDRs for two reasons. First, manufacturing is in substantial decline in Massachusetts, and once jobs in this area are lost, it is unlikely they will return. Second, manufacturing jobs have a "multiplier effect" whereby for each manufacturing job created, several more jobs in other sectors are also created (BECo Comments at 2). Thus, BECo asserts, EDRs available for manufacturing firms have the greatest probability of success (id.).

Additionally, BECo recommends that to be eligible for an EDR, a customer should demonstrate that the EDR affected its decision to stay or relocate in Massachusetts and in the utility's service territory (id. at 3). While agreeing that utilities should be encouraged to seek assistance from state agencies to certify or qualify potential EDR customers, BECo encourages the Department to allow substantial discretion and flexibility to utilities in administering EDRs (id.).

c. CLF

CLF asserts that EDRs should be approved only after every other more efficient means of achieving the desired result has been attempted



(CLF Comments at 2). In addition, CLF recommends that EDRs include a requirement that customers demonstrate that they are creating new jobs on either a state or regional basis (id. at 3). Further, CLF urges that any eligibility requirements should be strict and reviewable, so that the potential for free-riders will be minimized (id. at 2).

d. Commonwealth and CELCo

Commonwealth and CELCo recommend different eligibility requirements for new, expansion, and retention EDR customers. Commonwealth and CELCo propose that all potential EDR customers should be required to offer a minimum specified load (Commonwealth and CELCo Comments at 2-4). According to Commonwealth and CELCo, certification by EDR customers that the availability of the EDR was critical to the customer's decision to take service from the company may be required to help minimize free-ridership (id.). For new customers, Commonwealth and CELCo propose that they cannot have taken service from the utility offering the EDR during the prior twelve months. Moreover, new and expansion customers would be required to demonstrate that much of their sales occur out-of-state. Only expansion customers would be required to demonstrate a minimum level of added employment (id.).

Regarding retention customers, Commonwealth and CELCo propose that these customers must show that: (1) their load likely may

be lost without the EDR offering; (2) they are geographically mobile; (3) they have sought government grants or concessions; and (4) their cost of electricity is a significant element of their overall costs (id.). However, Commonwealth and CELCo caution the Department against overly prescriptive eligibility requirements for retention customers, contending that EDRs should be made reasonably available so that the maximum possible benefits result (id.).

e. DOER

DOER recommends that retention EDR customers be required to (1) demonstrate that their load would be lost if the discount were not provided, (2) demonstrate that the remaining customers will be better off by retaining the load, (3) seek governmental assistance, and (4) present a viable business plan that would allow the customer to remain within the utility's service territory beyond the term of the EDR (DOER Comments at 2). DOER also recommends that expansion EDR customers be required to achieve a minimum load growth in order to prevent free-riders and to ensure the recovery of administrative costs (id.).

f. EECo

EECo recommends that no generic eligibility criteria be established for EDRs since each utility's tariffs, customers, and service territories are different (EECo Comments at 2). However, EECo argues

that if the Department does adopt generic eligibility criteria, they should be broad enough to allow utilities to work with state economic development agencies to develop a package of financial incentives to attract new business to their service territories (EECo Reply Comments at 2). EECo argues that the Attorney General's proposal that EDRs be available only to customers who would otherwise not locate, expand, or continue operations in the particular service territory would be difficult to administer because a utility may be unable to demonstrate that the customer located, expanded, or continued its operations on the basis of the EDR alone (id.). EECo submits that a more reasonable standard is to require EDR customers to demonstrate that their decision to be served by a utility was due to the availability of a number of financial incentives, including the EDR (id.).

g. MECo

MECo recommends different eligibility criteria for new, expansion, and retention customers. MECo contends that EDRs for new and expansion customers should be designed to attract load from outside the Commonwealth, not to encourage relocation within the Commonwealth, because there is no net advantage to the economy of the state when one utility competes to provide service to an existing customer of another utility located in the state (MECo Reply Comments at 5).

According to MECo, eligibility requirements for retention customers should be more comprehensive than eligibility requirements for new and expansion customers in order to minimize free-ridership and the appearance of discrimination (id. at 5-6). MECo contends that in the case of new and expansion EDRs, free-riders still provide net benefits by making additional contribution to fixed costs, while free-riders under a retention EDR create a net loss of contribution margin (id. at 4). MECo proposes that retention customers be required to provide (1) a written offer for a discounted rate from an out-of-state utility, (2) a commitment to remain an all-requirements customer of the utility, (3) a commitment to maintain a minimum level of employment and/or energy usage beyond the term of the EDR, (4) a commitment to make additional investments in Massachusetts facilities, (5) a commitment to relocate other facilities into Massachusetts in the future, and (6) security provisions to guarantee these commitments (id.).

### 3. Analysis and Findings

As noted, with the exception of EECco, all parties who commented on the issue of eligibility requirements recommended that clear eligibility criteria be incorporated into all EDRs and that separate eligibility requirements be established for retention, new, and expansion EDRs. The issues to be addressed are (1) the appropriate

generic eligibility requirements for EDRs in order to assure that the desired benefits will accrue, and (2) whether there should be different eligibility requirements for different types of EDR customers, i.e., new, expansion, and retention customers.

In Section II.A, above, the Department held that EDRs available to load that would not be served under a company's general rate schedules could provide certain benefits, such as increased overall contributions to fixed costs. This goal suggests that there are certain eligibility requirements that should be common to all EDRs. However, other goals, such as limiting the number of EDR free-riders, also support the establishment of some eligibility requirements specific to the different types of EDRs.

a. Generic Eligibility Requirements

The Department concurs with the argument that EDR customers should be required to maintain a minimum level of load. The minimum level of load will vary by utility as well as over time, depending on the amount of available system capacity. In recognition of the uncertainty surrounding what minimum load is necessary, the Department will allow each company to propose a minimum load level for EDR customers suitable to its particular customer base and level of excess capacity.

In order to minimize the potential for free-ridership, the

Department finds that several factors must be considered, including the extent to which (1) the EDR is a critical factor in a customer's determination to expand, relocate, or continue operations in the utility's service area, (2) electricity is a significant portion of a customer's total operating expenses, (3) a customer has viable economic alternatives to the utility's service, and (4) a customer can relocate easily.

In response to concerns that an EDR should not be the only factor influencing a customer's decision to take service from a particular utility, we find that there should be a requirement that potential EDR customers make all reasonable efforts to secure government grants or other concessions.

We find BECo's argument to restrict availability of EDRs to manufacturing firms unpersuasive. Although it may be true that manufacturing businesses can offer significant load, it is the load characteristic of an EDR customer, not the particular type of business in which the customer is engaged, which will contribute to the anticipated benefits of EDRs. Limiting eligibility to specific types of businesses could exclude from participation in EDRs customers who would be able to provide substantial benefits.

The issues relating to C&LM requirements are discussed in Section II.D, infra.

b. Requirements for New and Expansion  
Customers

We agree with Commonwealth and CELCo that, in order to minimize free-ridership, new customers taking service under an EDR must not have taken service from the utility during the immediate past. The twelve months proposed by Commonwealth and CELCo may be a reasonable time period for some utilities, but may not be appropriate for all utilities. In proposing EDRs, companies shall include a requirement that new customers cannot have taken service from the company for a specified time period immediately preceding the commencement of new service. Companies, however, will be required to demonstrate the appropriateness of the specified time period proposed.

In regard to new load, we agree with MECo that net benefits to the state's economy may be reduced or negligible when EDR customers relocate within Massachusetts. To avoid migration between service territories within Massachusetts, the Department finds that EDRs for new customers must require that customers certify that they would not eliminate or curtail their operations in one service territory simply to take advantage of an EDR in another service territory. For expansion customers, however, we are not convinced that similar considerations should apply; MECo has provided no evidence that there is a net loss to one utility if a customer in its service territory expands into the

service area of another utility. We note that these findings are consistent with the premise underlying Massachusetts law and Department precedent restricting promotional advertising by utilities which stimulates the use of products or services which are subject to direct competition from products or services of entities regulated by the Department or any other governmental agency.<sup>4</sup>

Regarding the additional requirements recommended by the parties, the Department finds that although requiring that new and expansion customers (1) contribute to job growth in the service area, and (2) demonstrate a high proportion of out-of-state-sales may benefit the local economy, such requirements are not critical to the goals set out in Section II.A above. Therefore, the Department will not require that new and expansion EDR customers demonstrate job growth as a requirement for EDR eligibility.

c. Requirements for Retention Customers

Retention customers present unique free-ridership concerns because, while free-riders providing new or expansion load provide some additional contribution margin, free-riders on a retention EDR create a net loss of contribution margin. Thus, the Department finds it appropriate to require that such customers make a clear demonstration

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<sup>4</sup> See M.G.L. c. 164, § 33A; The Berkshire Gas Company, D.P.U. 92-210 at 98 (1993).



that (1) they are at significant risk of curtailing their operations within the state, and (2) retaining their load in the service territory is in the best interests of the ratepayers.

We decline to adopt MECo's suggested requirements that EDR retention customers (1) remain all-requirements customers,<sup>5</sup> (2) guarantee future investment in Massachusetts, or (3) provide evidence that they were offered a discounted rate from an out-of-state utility. The requirement that a retention customer provide evidence that it was offered a discounted rate from an out-of-state utility is not necessary because it is more likely that an EDR becomes a relevant factor in the decision making of a customer who is unable to find a commensurate concession in another state.

C. Administration -- Tariff or Contract

1. Introduction

There is no consensus among the parties who submitted comments regarding whether EDRs should be offered through tariff or contract.

2. Positions of Parties

Commonwealth, CELCo, and DOER endorse using tariffs rather than special contracts to implement EDRs, arguing that tariffs (1) are

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<sup>5</sup> This, however, is an option available to the utility to reduce the risk of free-ridership associated with retention customers.

public documents, (2) clearly identify the terms and conditions of the available rate, (3) are non-discriminatory, and (4) streamline regulatory review (Commonwealth and CELCo Comments at 1, n.1; RR-DPU-8; DOER Comments at 2). In addition to supporting the use of tariffs generally for EDRs, Commonwealth and CELCo endorse the limited use of special contracts in cases where a customer does not meet all eligibility requirements for a tariffed EDR, but can demonstrate general compliance with the tariffed eligibility requirements as well as resulting benefits (Commonwealth and CELCo Comments at 1, n.1).<sup>6</sup>

EECo contends that tariffs are unnecessary and less effective than special contracts for administering EDRs (EECo Reply Comments at 4). In addition, EECO asserts that an EDR contract may require certain good faith representations on the part of the customer, thus providing the utility the right to discontinue the EDR or possibly recover damages if the representations made to the company to secure the contract later prove to be false (id.).

MECo endorses the use of special EDR contracts for all retention

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<sup>6</sup> Specifically, Commonwealth proposes that special contracts should be offered in cases involving a service offering that is: (1) unique to the specific customer or small group of uniquely situated customers involved; (2) unlikely to apply to other customers, based upon what reasonably can be known at the time; and/or (3) not intended to be offered to similarly situated customers over time (RR-DPU-8).

EDR customers on the basis that retention EDRs should be permitted only on rare occasions after a subjective, case-by-case review of each retention customer's particular situation (MECo Supplemental Comments at 2, 4-5).<sup>7</sup>

### 3. Analysis and Findings

#### a. New and Expansion Customers

Electric companies operating within Massachusetts may charge customers for the provision of service under two arrangements: (1) by tariff, and (2) by special contract. G.L. c. 164, § 94. Generally, a tariff is a public document setting forth a description of the utility's services being offered, the availability of the services offered, rates and charges with respect to the services, and governing rules, regulations and practices relating to those services. International Tel. and Tel. Co. v. United Tel. Co. of Florida, 453 F. Supp. 352, 357, n.4 (D.C. Fla. 1975). Tariffs have advantages over contracts in that they (1) are available to all qualified customers without preference, and (2) can be reviewed more efficiently by the Department. If an EDR tariff is properly designed to ensure that serving eligible customers will provide the

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<sup>7</sup> MECo did not specify whether it prefers tariffs or contracts for new and expansion customers.

intended benefits, any customer who can contribute to those benefits should meet the criteria for eligibility.

While EEC<sub>o</sub> argues that offering EDRs through contracts will enable the utility to set preconditions and preserve certain rights, EEC<sub>o</sub> did not indicate why such conditions cannot be incorporated into a tariff. However, as Commonwealth and CELCo have argued, there may be some instances in which an individual EDR contract is desirable. The Department finds no basis in the instant proceeding to prohibit the offering of EDRs through contract. Accordingly, the Department will not preclude companies from proposing specific EDR contracts in cases where the terms of an EDR tariff do not apply to customers who could nevertheless provide significant benefits consistent with the goals of EDRs.<sup>8</sup>

b. Retention Customers

As found in Section II.B, supra, unique free-ridership concerns are presented by EDRs for retention customers. In this respect, there is sufficient risk associated with retention EDRs, as compared to new and expansion EDRs, to warrant closer scrutiny of the circumstances of prospective retention EDR customers. Retention EDRs should

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<sup>8</sup> Where a company submits a special EDR contract for approval, the contract must be consistent with the requirements of G.L. c. 164, § 94 and 220 C.M.R. §§ 5.00 et seq.

therefore include a requirement that customers clearly demonstrate that they are at significant risk of curtailing their operations within the utility's service territory. Accordingly, we will permit retention EDRs only under special contract after a case-by-case review by the Department.

D. Conservation and Load Management

Numerous parties commented on the issue of the propriety of a C&LM requirement for EDR customers.

1. Positions of Parties

The Attorney General, DOER, EEC<sub>o</sub>, and MEC<sub>o</sub> recommend that full participation in all applicable C&LM programs should be required for participation in EDRs (Attorney General Comments at 8; DOER Comments at 2; EEC<sub>o</sub> Comments at 4; MEC<sub>o</sub> Supplemental Comments at 5).

The Attorney General asserts that requiring full participation in all applicable C&LM programs will ensure that uneconomic sales are not encouraged by an EDR (Attorney General Comments at 8).

CLF argues that utilities should offer priority C&LM installations rather than EDRs. CLF further argues that "[n]o utility should be permitted to implement an EDR without, at a minimum, showing why any rate discount should not be restricted to that portion of promised savings that cannot be achieved through participation in ... C&LM ..."

(CLF Comments at 2). CLF asserts that priority C&LM installations in many cases will result in higher customer savings because, unlike EDRs, energy efficiency measures will generate long-term savings (id. at 2).

BECo and Commonwealth recommend that participation in cost-effective C&LM should be encouraged for all customers and argue that there is no reason to distinguish EDR customers from other customers for C&LM purposes. Accordingly, BECo and Commonwealth maintain that mandatory C&LM participation should not be a requirement for eligibility under an EDR (BECo Comments at 3; Commonwealth Supplemental Comments at 1). Although Commonwealth states that encouraging C&LM participation supports both (1) economic recovery through higher combined savings and (2) environmentally sound, efficient use of energy, the Company maintains that "it would be neither feasible nor desirable to allow [EDR] customers priority in the queue for C&LM service" (Commonwealth Supplemental Comments at 1; RR-DPU-5). BECo maintains that utilities should work closely with EDR customers to ensure that they receive both the long-term benefits of energy efficiency and the short-term benefits of an EDR (BECo Comments at 3).

## 2. Analysis and Findings

The primary issue to be decided is whether EDR customers should

be required to participate in C&LM programs. The Department continues to endorse the proposition that all customers should be afforded the opportunity to participate in cost-effective C&LM. Proper implementation of cost-effective C&LM will result in long-term savings not only for participating customers, but also for all other ratepayers.

While the Department recognizes the benefits of and encourages participation in C&LM, we have never mandated customer participation in any C&LM program.<sup>9</sup> Mandatory participation in C&LM by EDR customers as proposed by certain parties could have the effect of giving EDR customers priority over other customers in obtaining C&LM programs. We are not persuaded that EDR customers should be required to participate or given priority in C&LM. In fact, artificial criteria that mandate or foreclose participation in C&LM by certain customers on grounds other than cost-effectiveness could result in less-than-maximum long-term savings and ratepayer benefits.<sup>10</sup>

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<sup>9</sup> While the Department has approved certain EDRs which require participation in C&LM (see Department letter to MECo dated October 31, 1991), we have not made such a requirement a condition for our approval.

<sup>10</sup> An increasingly important consideration in the implementation of C&LM is for utilities to pursue the most cost-effective use of their C&LM budgets in order to ensure that ratepayers receive the maximum benefits from limited C&LM funds. The requirement that all customers who present opportunities for cost-effective C&LM should be served begs the problem of limited funds. While  
(continued...)

Therefore, the Department declines to make C&LM participation a precondition or requirement for EDR eligibility.

In recognition of the fact that new customers may be unfamiliar with a utility's C&LM programs, the Department directs all companies to inform EDR customers about available C&LM opportunities and to encourage them, as well as all customers to participate in those C&LM programs that may be particularly beneficial to them. Further, the Department orders companies to apply to EDR customers all conservation charges that are part of a company's general tariffs that the EDR customer would be subject to in the absence of the EDR. The Department also notes that while it declines to make C&LM participation mandatory, companies may, if they deem it appropriate, include C&LM participation as a precondition to subscribe to an EDR. Like any other tariff provision, that precondition would be subject to Department approval as part of the overall EDR tariff review.

E. Determination of EDRs

Numerous parties also commented on the question of what is appropriate to include in determining the proper EDR, e.g. is marginal cost plus some additional margin appropriate.

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<sup>10</sup>(...continued)

a simple queue could be used to decide who is served, attention to relative cost-effectiveness offers the opportunity for delivering more C&LM savings for the same investment.



1. Positions of Parties

CLF, DOER, the Attorney General, EEC<sub>o</sub>, Commonwealth, CELC<sub>o</sub>, and MEC<sub>o</sub> assert that all EDRs should exceed the long-run marginal costs (Attorney General Comments at 5; Commonwealth and CELC<sub>o</sub> Comments at 4; CLF Comments at 2; DOER Comments at 2; EEC<sub>o</sub> Comments at 4; MEC<sub>o</sub> Supplemental Comments at 5).

CLF further contends that EDR customers should pay a significant percentage of the difference between embedded costs and long-run marginal costs and "categorically opposes" EDRs that only charge the variable operating cost as the rate (CLF Comments at 2).

DOER also maintains that (1) EDRs for retention customers should be set as close as possible to the otherwise applicable general tariffs, (2) EDRs for new and expansion customers should provide some contribution to fixed costs, and (3) all EDR customers should be required to pay the customary contribution in aid of construction where the utility must install facilities to provide an EDR customer with service (DOER Comments at 2).

The Attorney General also argues that EDR discounts should be the minimum necessary to achieve the desired economic activity (Attorney General Comments at 6). The Attorney General further argues that the longer the duration of an EDR, the greater the margin over marginal cost should be, because there is an increased risk of

whether excess capacity will continue to exist (id. at 7).

EECo disagrees with the Attorney General, asserting that the burden of proof to support a longer and or higher level of discount is not automatically greater and that any standard of review should be based upon an evaluation of each company's costs, capacity situation, and the economic development needs of its service territory (EECo Supplemental Comments at 3). EECo also states that it may be necessary to price EDRs for retention customers differently from EDRs for new and expansion customers (EECo Comments at 5).

Commonwealth and CELCo assert that a company's general rate schedule should be used as the starting point for pricing EDRs so as to provide an easy transition back to embedded cost rates (Commonwealth and CELCo Comments at 4). Commonwealth and CELCo recommend that, to the extent possible, EDRs should retain the marginal-cost-based rate design features of the company's general rate schedule from which the EDR was derived (id.).

MECo states that the EDR discount for retention customers should be less than the assistance provided by the state or local government to that customer. MECo asserts that this requirement would (1) recognize that electric rates are only one of a number of factors involved in decisions about where to locate a business, and (2) minimize free-riders by providing an objective basis upon which to

determine if the EDR is needed to retain a customer (MECo Supplemental Comments at 6).

BECo asserts that marginal costs should serve as a floor for EDRs and that no specific margin above marginal costs should be required (BECo Comments at 1). While BECo asserts that, in general, the marginal cost study filed by a utility in its last rate case should be used to determine the marginal costs, BECo also argues that when a company has excess capacity it should be allowed to price EDRs at short-run marginal costs where the EDR is only available for a limited time period (id. at 2). Additionally, BECo states that if the currency of a marginal cost study is in question, the Department may require periodic filings of marginal cost studies. BECo contends that all marginal cost studies should be filed on a confidential basis since such data has competitive value (id.).

## 2. Analysis and Findings

With the exception of BECo, all parties who commented on this issue agree that EDRs should exceed long-run marginal costs. The use of marginal costs in the design of rates is a longstanding Department goal. The Department has held that economic efficiency in rate setting is achieved when the rates charged reflect the incremental cost to a utility of producing one additional unit of output, so that customers receive an accurate price signal upon which to base consumption. See

The Berkshire Gas Company, D.P.U. 92-210, at 202-203 (1993); Bay State Gas Company, D.P.U. 92-111, at 311 (1992); Western Massachusetts Electric Company, D.P.U. 90-300, at 14 (1991).

Additionally, the Department has held that if a customer were to leave a company's system because of the absence of a below-embedded-cost rate, any margin above the incremental cost of serving that customer provides a benefit to other customers. See Boston Gas Company, D.P.U. 92-259, at 88 (1993). In Sections II.A and B, above, the Department found that EDRs could be made available only to customers who, in the absence of the EDR, would not take service from the company. Thus, EDRs will provide benefits in the form of contributions to fixed costs that would otherwise be lost. We further note that utilities themselves have an incentive to maximize this contribution, because utilities are able to retain such contributions between rate cases. Here, the Department finds that EDRs must exceed long-run marginal costs.

While BECo's recommendation to allow the use of short-run marginal costs for short-term EDRs endeavors to match the marginal cost of serving an EDR customer with the duration of an EDR and therefore provides a theoretically appropriate lower bound for the EDR, the Department finds that the use of long-run marginal costs for EDRs of all durations will (1) appropriately balance the goal of maximizing

the contributions to fixed costs from EDR customers while avoiding any additional costs for non-EDR customers, (2) provide EDR rate levels sufficient to achieve the goals of EDRs, and (3) provide fair and non-discriminatory pricing for EDR customers and non-EDR customers alike. Additionally, the Department notes that in extended periods of excess capacity, any capacity costs included in a long-run marginal cost study will be significantly discounted.

Additionally, the Department finds that MECo's suggestion to limit the value of EDR benefits for retention customers to the level of government assistance received by such a customer may unduly foreclose a customer from EDR eligibility if the customer is unable to secure government grants or concessions but would otherwise be able to provide the benefits of making economic use of a utility's excess capacity. As found above, any load which a company would otherwise not serve, if priced above long-run marginal costs, will provide a sufficiently large contribution to fixed costs that would otherwise not exist, that will benefit other ratepayers.

The Department declines, however, to predetermine a specific level by which EDRs must exceed long-run marginal costs. When determining the rate to be charged under EDRs, companies must carefully consider and thoroughly evaluate all issues, including the potential trade-offs between individual contributions to fixed costs and

overall participation. While the evaluation of such trade-offs may be different for retention customers than for new or expansion customers, the Department declines to establish different standards for the determination of EDRs for retention customers. The Department directs companies to carefully consider these trade-offs, along with the goal of minimizing free-riders (see Section II.B, above), and provide such evaluations when it files proposed EDRs.

In setting EDRs, the Department directs companies to use the marginal cost study from their last rate case, updated for any significant changes, such as a change in the company's year of capacity need. Companies must provide references for the sources of any changes to the marginal cost study. Such references should include all applicable Department orders, such as those addressing demand forecasts. The Department directs all companies to file such information when requesting approval of an EDR. The Department will consider the issue of confidentiality of such information at the time it is filed.

Finally, the Department directs companies to include in EDRs the same contribution in aid of construction provisions that are included in the companies' general tariffs that EDR customers could take service under in the absence of the EDR.

F. Duration of EDRs

Numerous parties commented on the issues of (1) the appropriate duration of an EDR, and (2) whether the duration of EDRs should be tied to the duration of a company's excess capacity.

1. Positions of Parties

The Attorney General, DOER, EEC<sub>o</sub>, and MEC<sub>o</sub> assert that the duration of an EDR offering should be limited to the period of time that a company has excess capacity (Attorney General Comments at 5; DOER Supplemental Comments at 1; EEC<sub>o</sub> Comments at 3; MEC<sub>o</sub> Supplemental Comments at 2).

The Attorney General submits that MEC<sub>o</sub>'s EDR, which has a two-year term, has been very successful and recommends that all companies be required to demonstrate why the duration of EDRs beyond 1996 is necessary (Attorney General Comments at 7).

EEC<sub>o</sub> disagrees with the Attorney General's recommendation for a two-year duration for EDRs. EEC<sub>o</sub> asserts that this recommendation is based solely on one utility's experience and that each company's EDR program must be evaluated based on the capacity situation of that company and the economic development needs of its service territory (EEC<sub>o</sub> Supplemental Comments at 3).

BEC<sub>o</sub> asserts that the duration of an EDR should be consistent with the planning horizon used in the marginal cost study. BEC<sub>o</sub> maintains that a utility's marginal costs are a function of the time that

it needs new capacity and if calculated properly will accurately reflect both the extent and duration of any excess capacity (BEC Co Comments at 2).

Commonwealth argues that while an EDR should exceed marginal costs, the level of available capacity is only one factor affecting marginal costs and it is possible that an EDR could provide benefits if little or no excess capacity exists (Commonwealth Reply Comments at 3). Commonwealth asserts that monitoring marginal costs, reporting such data to the Department, and maintaining the option to close an EDR should avoid any potential for an EDR to add capacity costs while still allowing an EDR to provide benefits (id.).

## 2. Analysis and Findings

In Section II.E, above, the Department found that any load which a company would otherwise not serve, if priced above long-run marginal costs, will provide benefits to other ratepayers. Although it is true that a company's capacity situation is reflected in its long-run marginal costs, that factor is insufficient to justify setting either an arbitrary duration period or no duration period at all. EDRs, when applied judiciously and for discrete time periods, are an appropriate measure to maximize the efficient use of a company's capacity and contributions to its fixed costs; EDRs should not be confused with a company's generally available rate schedules under which service is



provided at an embedded-cost-to-serve rate level.

The Department finds that the duration of an EDR should (1) be limited to the duration that maximizes the overall contribution to fixed costs, recognizing that EDRs are a short-term measure while excess capacity may exist in the longer-term, and (2) be tied to an individual company's excess capacity situation. The Department encourages companies to be conservative in determining the appropriate duration of their EDRs and notes that a company may re-file an EDR with the Department for its review if it determines that continuing to offer the EDR beyond the originally approved duration period would provide benefits to ratepayers.

The Department directs companies to demonstrate their capacity situation in each EDR filing. Companies should use approved forecasts and supply plans from their most recent proceedings before the Department, to the extent possible, updated for any significant changes. Companies also must include references to the sources of any changes, such as internal analyses or Department approved studies.<sup>11</sup> Additionally, the Department directs companies to carefully monitor

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<sup>11</sup> The Department notes that its review of capacity-related information in the context of an EDR filing shall not be considered a determination by the Department as to the merits of such information for purposes other than initially approving or disapproving an EDR.

their (1) capacity situation, (2) marginal costs, and (3) the relationship between EDRs and marginal costs, and promptly suspend availability of the EDR, and petition the Department to close the EDR, if they determine that the EDR is causing any increase in costs. Further, companies should carefully evaluate the on-going impact of each EDR customer on its costs. If EDR customers cause a company's costs to increase in a way not originally anticipated in the EDR proposal, in the absence of a specific provision in the EDR that would allow the company to terminate under such circumstances, the company will be required to honor the EDR for its full term and absorb those costs.

G. Ratemaking

In the instant proceeding, numerous parties commented on the ratemaking treatment to be accorded EDRs.

1. Positions of Parties

The Attorney General and EEC<sub>o</sub> recommend that the Department reaffirm its precedent that the ratemaking treatment of EDRs be determined in a base rate proceeding (Attorney General Supplemental Comments at 1-2; Attorney General Comments at 3-4; EEC<sub>o</sub> Comments at 4). Further, the Attorney General asserts that none of the other commentators in this proceeding offered any rationale for changing Department precedent (Attorney General Supplemental Comments at

1).

BECo recommends that the Department revise its precedent and determine the ratemaking treatment for EDRs in the instant proceeding (BECo Comments at 3). BECo proposes that no costs be allocated to EDR customers during a base rate proceeding and that all revenues received from EDR customers be credited to the utility's cost of service. BECo states that this ratemaking treatment will pass both the revenues and the costs associated with EDR customers onto other customers as if EDR customers had paid the otherwise applicable embedded cost rate (id.). In the alternative, BECo recommends fully allocating embedded costs to EDR customers and assuming that the revenues received from those customers equal the otherwise applicable embedded cost rate (id.).

Commonwealth and CELCo maintain that Department precedent for tariff approval includes, at least implicitly, a determination of the ratemaking treatment to be accorded that tariff. Accordingly, Commonwealth and CELCo maintain that the Department should determine the ratemaking treatment to be accorded an EDR at the time of the EDR's approval (Commonwealth and CELCo Comments at 5). Further, Commonwealth and CELCo recommend that the Department differentiate between retention customers and new and expansion customers for ratemaking purposes. Commonwealth and CELCo assert

that including the costs and revenues associated with retention customers in base rates is consistent with the Department's known and measurable standard which allows base rate treatment of costs and revenues associated with existing customers absent any approved adjustments (id. at 4-5). In the event that the timing of the approval of an EDR and a rate case do not coincide, Commonwealth and CELCo assert that the EDR's costs should be deferred until the next rate case because the primary reason a utility offers an EDR is to benefit other ratepayers by increasing the contribution to fixed costs (id. at 5). With regard to new and expansion customers, Commonwealth and CELCo recommend that, to the extent they are known and measurable at the time of a rate case, the costs and revenues from such customers should be reflected in base rates (id.).

CLF recommends that as a condition for approval of an EDR, a utility's shareholders be required to absorb any cross-subsidization that occurs (CLF Comments at 2).

## 2. Analysis and Findings

With regard to the ratemaking treatment to be accorded EDRs, the Department has found that:

[o]utside of significant resource decisions, we do not preapprove ratemaking treatment for companies' expense. Therefore, the Department finds that it would be premature to set a specific policy for cost recovery before any benefits or costs ... are known and measurable. The Department

further finds that the appropriate forum to decide the ratemaking treatment ... is in a general rate case proceeding.

Massachusetts Electric Company, D.P.U. 91-190-C at 4-5 (1992). See also Department Letter to MECo dated March 22, 1993; Department Letter to EECo dated May 1, 1992.

Although BECo recommended that the Department change its precedent, BECo failed to either (1) provide evidence or compelling argument in support of its proposal, or (2) convince the Department that its proposal is either consistent with or superior to the Department's precedent. Commonwealth and CELCo failed to address the Department's precedent regarding the ratemaking treatment to be accorded EDRs at all. In addition, absent a finding from the Department regarding actual revenues and costs associated with a specific EDR, Commonwealth and CELCo are incorrect in their argument that the potential revenues and expenses associated with all EDR customers are known and measurable.

With regard to Commonwealth and CELCo's proposal to defer the expenses associated with retention customers between rate cases, it is the Department's long-standing policy that in order to qualify for Department deferral, expenses must be (1) large enough to force the company to bring a series of rate cases that it would otherwise not bring and (2) repeating or ongoing in nature, though at an

unpredictable level and regularity. Commonwealth Electric Company, D.P.U. 90-331, at 38 (1991); Colonial Gas Company, D.P.U. 89-70, at 4-7 (1989). While a company may request deferral of specific EDR expenses, such a request must be accompanied by a demonstration of the benefits realized by the company and its ratepayers due to the EDR. Moreover, companies must demonstrate why certain expenses should be included in base rates, not just that the expenditures were made and that they are known and measurable. See Cambridge Electric Light Company, D.P.U. 92-250, at 127 (1993); The Berkshire Gas Company, D.P.U. 92-210, at 78 (1992); Massachusetts Electric Company, D.P.U. 92-78, at 61 (1992). Therefore, the Department finds that these companies have failed to persuade us that their respective proposals are in accord with Department precedent or that our precedent should be changed. Accordingly, BECo's, Commonwealth's and Cambridge's proposals are denied.

With regard to CLF's assertions about "cross-subsidization", CLF did not provide a sufficiently clear explanation of its concern. Accordingly, the Department is unable to address CLF's comments.

The Department reaffirms its precedent and continues to find it appropriate to determine the ratemaking treatment of an EDR in a base rate proceeding where the revenues and expenses associated with the EDR are known and measurable in a test year. Massachusetts Electric

Company, D.P.U. 91-190-C at 5 (1992). To aid in the Department's review of the ratemaking treatment to be accorded EDRs, utilities should provide all revenues, costs (both marginal and incremental) and billing determinants associated with EDRs in a rate case filing.

H. Impact of New Standards on Existing EDRs and EDR Customers

Numerous parties commented on the impact any new standards should have on existing EDRs and EDR customers. All parties who commented on this issue urged the Department to apply any new standard for EDRs prospectively and either grandfather customers on existing rates and/or allow utilities to withdraw or refile their existing EDRs (Attorney General Supplemental Comments at 3; EEC Co Supplemental Comments at 4-5; MECo Supplemental Comments at 3; Commonwealth Reply Comments at 3).

The Department has approved ten EDRs to date. Some of these EDRs may not be fully consistent with the standards promulgated in this Order. The Department agrees with the parties that the standards articulated in this Order should apply to EDRs prospectively.

Therefore, all customers currently served under Department-approved EDRs are hereby grandfathered on such EDRs for the full term of the EDR as described in the tariff or agreement.

The Department directs any companies with EDRs currently in

effect that, in a company's estimation, do not comply with the standards articulated in this Order to revise such EDRs so that they are in compliance with this Order. Revisions should be filed with the Department as soon as possible for its review. EDRs which do not require modification should not be re-submitted to the Department.

We put the companies on notice that this Order shall serve as one of the bases for determining the ratemaking treatment of a company's EDRs in its next rate case. Companies are also notified that they will be required to demonstrate in their next rate cases that EDRs in existence after the date of this Order comply with its standards. The Department directs all companies currently offering EDRs to endeavor to continue to make EDRs available to their customers and to make any revisions necessary as promptly as possible so as not to unduly disrupt the availability of the EDRs.

### III. VACANT SPACE RATE

In this section we address the proposed Vacant Space Rate and evaluate it using the standards articulated above.

#### A. Positions of Parties

##### 1. The Attorney General

According to the Attorney General, the proposed Rate G-8 should be disallowed by the Department unless: (1) the eligibility terms are modified to provide some procedural protection against free-riders; and



(2) it is amended to require that all customers on that rate fully participate in Commonwealth's C&LM programs (Attorney General Supplemental Comments at 2).

2. CLF

CLF asserts that Commonwealth's poor management performance is partly responsible for its relatively high rates and urges the Department not to allow poor management performance to become an excuse for side-stepping least-cost principles by adopting economic development rates (CLF Comments at 1).

3. DOER

DOER supports vacant space EDRs because they: (1) improve the overall utilization of utility assets; (2) encourage the use of excess space that should be fully used before new facilities are constructed; and (3) may provide an incentive for business growth in Massachusetts (DOER Supplemental Comments at 1).

4. Commonwealth

Commonwealth states that its purpose in offering Rate G-8 is to try to address the significant amount of vacant factory and office space in its service territory in an effort to contribute to the revitalization of the economy of its service territory (Exh. C-3 at 3).

Commonwealth asserts that any customers taking service on Rate G-8 will benefit both Commonwealth and its ratepayers because

any revenues realized from Vacant Space Rate customers will exceed the variable and long-run incremental capacity costs of serving them, thus producing a substantial contribution to the recovery of embedded fixed costs (id. at 5). Additionally, Commonwealth asserts that Rate G-8's two-year term renders moot the question of whether excess capacity will continue throughout the duration of the rate offering because Commonwealth's current excess capacity condition is not likely to change in the near term and there is little, if any, potential for fixed cost increases due to the provision of service under Rate G-8. Further, Commonwealth asserts that any usage on Rate G-8 will provide immediate benefits to existing Commonwealth ratepayers by providing an expanded kilowatthour base over which to spread fixed charges in the fuel charge (id. at 8-9). Commonwealth notes that Rate G-8 is different from other EDRs in that Rate G-8 would not be available to existing customers (id. at 5).

According to Commonwealth, the availability of Rate G-8 was targeted at large customers because their contribution to fixed costs will be correspondingly large (Commonwealth Supplemental Comments at 2). In addition, the costs and burdens of administering Rate G-8 would be relatively small when applied to fewer, larger customers. Commonwealth also expects that the addition of such customers will aid the creation of new jobs and general economic improvement (id.).

Commonwealth asserts that concerns about free-riders are addressed by the fact that Rate G-8 would be unavailable to customers relocating within its service territory (Exh. C-3, at 8). Commonwealth argues that requiring that the service location be vacant for a period of at least twelve months also minimizes the chance of free-riders because it is unlikely that someone would hold a space vacant for that length of time simply for the purpose of achieving eligibility for Rate G-8 (Commonwealth Supplemental Comments at 4). Commonwealth is willing to require certification from a potential customer that it was not intending to locate in the service area in the absence of Rate G-8 (id. at 5). Commonwealth asserts that requiring certification second-guesses the customer, and contends that its customer relations would be better served by avoiding it (id.).

In response to the Attorney General's argument to require C&LM participation, Commonwealth notes that the requirement that Vacant Space Rate customers use "reasonable efforts" to participate in C&LM is sufficient to ensure efficient electric usage and allow reasonable customer discretion in what changes the customer makes to plant and equipment (Commonwealth Reply Comments at 1).

**B. Analysis and Findings**

In evaluating whether the Vacant Space rate proposed by the Company in this case meets the above criteria, we will first address the

general propriety of a vacant space rate, and then apply the criteria outlined above to Commonwealth's proposal.

First, we note that utilities with EDRs are held to the same principles as utilities without EDRs, including least-cost planning requirements. The issue for any EDR proposal is not the management performance or cost of generation of the company proposing an EDR, but rather, whether the company, with the EDR, would make sales that otherwise would not be made, in such a way as to contribute to fixed costs and use excess capacity in an efficient manner.

The key consideration regarding the propriety of a vacant space rate, as with any EDR, is whether it comports with the standards for EDRs that are set forth above. A proposal for a vacant space rate must demonstrate that it will (1) provide benefits to vacant space customers, other customers, and the utility; (2) provide contributions to fixed costs that otherwise would not exist; and (3) comply with the generic and specific eligibility requirements established in this Order. See Section II.B.3. With these safeguards, we find that the concept of a vacant space EDR is a legitimate method of design for EDRs.

An EDR based on the use of vacant space in a utility's service territory is designed to address one of many elements in a business' economic situation. As commenters in this case noted, a vacant space rate, as one component in a package of economic incentives, including

government assistance, is an initiative that could contribute to economic revitalization in the state. We find that a vacant space rate, insofar as it comports with the requirements set out in this Order, can be a reasonable method of marketing excess capacity through economic development rates.

Under the criteria established in this Order, we conclude that Commonwealth's proposal meets the standards for EDRs in the following respects: it is designed to (1) provide contributions to fixed costs that otherwise would not occur; (2) provide safeguards against increased costs to non-EDR customers due to the Vacant Space rate; (3) encourage C&LM; (4) limit the duration of the rate appropriately; (5) provide a reasonable level of discount; and (6) exceed marginal cost. However, the proposed rate does not provide sufficient safeguards against free-ridership, e.g., certification by the customer that the EDR was a key factor in its decision to take service, that electricity is a significant portion of its operating expenses, that its operation is geographically mobile, or that it has viable alternatives to the utility service. For this reason, we reject the Vacant Space rate as filed. However, we encourage the Company to resubmit a revised vacant space rate that complies with all standards and conditions in this Order.

V. DISSENTING OPINION OF COMMISSIONER BARBARA KATES-GARNICK

I must respectfully dissent from my fellow Commissioners' decision regarding requirements for EDRs in Massachusetts. I also must dissent from the majority's decision to approve Commonwealth Electric's proposed Vacant Space rate, M.D.P.U. 277.

Before articulating the reasons for disagreeing with my fellow Commissioners, I first would like to applaud the majority's willingness to delineate a set of standards and objectives for economic development rates filed by utilities in Massachusetts. As I have stated in a series of concurring and dissenting opinions, it is critical for this agency to clearly set out its principles and objectives on a regular basis, so that the entities under our jurisdiction can plan and make decisions in a more stable regulatory environment. See Colonial Gas Company, D.P.U. 93-78 (1993) (Commissioner Kates-Garnick, dissenting); Boston Edison Company, D.P.U. 93-37 (1993) (Commissioner Kates-Garnick, concurring), citing Cambridge Electric Light Company, D.P.U. 92-250 (1993) (Commissioner Kates-Garnick, concurring); Fitchburg Gas and Electric Light Company, D.P.U. 92-181 (1992) (Commissioner Kates-Garnick, dissenting); Letter from Commissioner Kates-Garnick to James

P. Finglas of AT&T Communications of New England, Inc., November 25, 1992, concerning the Department's approval of "900" telephone service. In this regard, the Order opening this proceeding represented an important step forward. However, today's majority opinion fails to outline clear standards for EDRs and leaves many questions unanswered.

In raising objections to specific aspects of the majority's decision, it is important to emphasize that I do not object to the concept of special rates for incremental load customers, if such rates are adopted in very specific circumstances. Utility rates, as a proxy for energy, are but one input to production and, hence, to economic development. Thus, it is my view that economic development rates for utilities have a role, albeit a limited one, in achieving important goals that we all share, i.e., creating jobs and increasing investment in the State. Where circumstances have lead to an excess capacity situation, I agree wholeheartedly with MECo's position that it is better to have some contribution to fixed costs than no contribution at all (MECo Comments at 2-3). It is within this context that economic development rates have some appeal.

However, as set out below, I must disagree with two choices made by my fellow Commissioners in the majority decision: (1) not requiring EDR customers to implement C&LM as a precondition for receiving

EDRs; and (2) accepting the very concept a "vacant space rate."

I must take exception to my colleagues' failure to require participation by EDR customers in C&LM programs as a precondition of receiving these rates. The four intervenors in this case, as well as CLF, presented strong arguments in favor of linking C&LM and EDRs, advocating that such a linkage is a necessary means of (1) ensuring efficient use of energy, and (2) discouraging uneconomic sales. My colleagues, however, have rejected these arguments because of nascent concerns that a utility's C&LM budget may be exhausted at the expense of other customers who could provide more cost-effective C&LM opportunities (Order at 23).

First, I am concerned about any policy which encourages a customer to consume electricity in a potentially inefficient manner. Even if one were to accept EDRs as some sort of "short-term fix," it is difficult to understand why one would not take all necessary steps to ensure that EDR customers -- like all customers -- use electricity as efficiently as possible.

Second, it is important to note that my colleagues for the first time have given credence to the notion of a C&LM queue based on relative cost-effectiveness. I am puzzled by this policy development since the Department consistently has required utilities to implement only those C&LM options which are cost-effective. Even if a utility



were to develop a C&LM implementation queue based on factors other than "first-come-first-served," it should be imperative to provide C&LM to those customers who do not have an economic incentive to consume electricity efficiently. It is not clear to me why the majority has chosen to focus on the C&LM queue issue instead of highlighting the clear long-term benefits that would flow to EDR customers as a result of mandatory participation in C&LM programs, i.e., ensuring efficient use of energy and lower utility bills.

Third, the majority decision underscores my fellow Commissioners' reluctance to delineate clear principles. If the majority is concerned that linkage of C&LM participation and EDRs may not maximize cost-effectiveness, then it is inconsistent to allow utilities the discretion to "include C&LM as a precondition to subscribe to an EDR" (Order at 24). Affording the "opportunity to participate in cost-effective C&LM" (Order at 23) rings hollow in the absence of a clear directive to do so.

Finally, I take issue generally with the concept of a "vacant space rate." The availability of rental space is tied to the level of rents, not to electric rates per se. For some potential renters of vacant space, electricity rates will contribute significantly to their costs of doing business; for other businesses that might occupy vacant space, energy costs are not significant and are only incidental to their business

decisions. Both types of customers will receive this EDR, regardless of their economic circumstances. Even with the eligibility requirement that "electricity is a significant portion of a customer's total operating expense" (Order at 15), ratepayers are not well-protected. Moreover, to allow a vacant space rate as a marketing tool, even with the so-called safeguards included in the majority decision, makes utility ratepayers bear costs for economic development that could have been handled through other approaches to economic revitalization. This is not a "marketing" tool that ratepayers should shoulder alone. I see no reason for a utility commission to approve a rate of this type.

In setting out the Department's standards for EDRs, my fellow commissioners appear to have traded long-term objectives for short-term advantages. The majority has placed utilities in the untenable position of trying to evaluate the validity of customer claims that cannot be evaluated; and they have opened the door to results that likely will be inconsistent with the long-term interests of ratepayers and utilities. Moreover, this Order represents further erosion of this Commission's commitment to conservation as a necessary means of achieving this State's economic, environmental and reliability goals.